



Case Number:	Civil Case 459 of 2010
Date Delivered:	17 Dec 2010
Case Class:	Criminal
Court:	High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)
Case Action:	Ruling
Judge:	Leonard Njagi
Citation:	CHARLES NDIRANGU KAMAU & 6 Others v WILLIAM KIMANI THUKU & 5 others [2010] eKLR
Advocates:	-
Case Summary:	-
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION – MILIMANI**

**CIVIL CASE NO. 459 OF 2010**

**IN THE MATTER OF NJOKERIO TRADING COMPANY LIMITED**

**AND**

**IN THE MATTER OF APPLICATION UNDER SECTION 185 OF THE COMPANIES ACT**

**BETWEEN**

**KAMAU..... CHARLES NDIRANGU ..... ST**  
**PLAINTIFF/APPLICANT**

**KAGECE..... KENNETH KAGOTHO ..... 2<sup>ND</sup>**  
**PLAINTIFF/APPLICANT**

**PETER THARAU KIARI.....**  
**..... 3<sup>RD</sup> PLAINTIFF/APPLICANT**

**MARY NJOKI NJOROGE.....**  
**..... 4<sup>TH</sup> PLAINTIFF/APPLICANT**

**SAMUEL NGANGA MUTHIGA.....**  
**..... 5<sup>TH</sup> PLAINTIFF/APPLICANT**

**JAMES KAMANDE.....**  
**..... 6<sup>TH</sup> PLAINTIFF/APPLICANT**

**DAVID NJUGI MUTURA.....**  
**..... 7<sup>TH</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**WILLIAM KIMANI THUKU.....**

.....1<sup>ST</sup> DEFENDANT/RESPONDENT

**BENARD M NJAU**.....

.....2<sup>ND</sup> DEFENDANT/RESPONDENT

**JOSEPH NJENGA NJUGUNA**.....

.....3<sup>RD</sup> DEFENDANT/RESPONDENT

**PETER KAMIRI MBUR**.....

.....4<sup>TH</sup> DEFENDANT/RESPONDENT

**MARGRET NJERI GIKANGA**.....

.....5<sup>TH</sup> DEFENDANT/RESPONDENT

**AUGUSTINE N MBUGUA** .....

.....6<sup>TH</sup> DEFENDANT/RESPONDENT

### **RULING**

The application before the court is brought by a Chamber Summons dated 5<sup>th</sup> July, 2010, and taken out under Order XXXIX Rules 1,2,3,7 (1) (b) and 9 of the Civil Procedure Rules; and Sections 3A, 3B, 63 (c) and (e) of the Civil Procedure Acts. The applicants seek from the court the following orders –

**1) That pursuant to the extra-ordinary general meeting of the Company's shareholders held on the 18<sup>th</sup> June, 2010, appointing the new Directors as office bearers, the Respondents who were then Directors do vacate the office immediately.**

**2) That the Respondents hand over all the Company's Books of Accounts, documents and all other assets in their possession that belong to the Company.**

**3) That this Honourable Court do grant leave to the Plaintiffs to forthwith enter upon and repossess the premises of the Company and all/or any other property of the company.**

4) That a permanent injunction do issue against the Respondents restraining them from maliciously interfering with the management and running of the Company.

5) That pending the hearing and the determination of this application, the Honourable court be pleased to grant a temporary injunction restraining the Respondents themselves, servants, agents, officers from destroying, tampering with, removing, falsifying or in any other manner whatsoever interfering with the Company's books of Accounts, records and minutes books (if any).

6) That pending the hearing and determination of this application and the suit, the Honourable Court do grant temporary injunction restrig the Respondents themselves, servants, agents or officers from destroying, selling, alienating, transferring, disposing, removing or in any manner whatsoever interfering with the Company's books of accounts, records and minute books (if any).

7) That pending the hearing and determination of this application and the suit, the Honourable Court do grant a temporary injunction restraining the Respondents themselves, servants, agents or any other officers from destroying, selling, alienating, transferring, disposing, removing or in any manner whatsoever tampering with "the assets of the shareholdings of the Company" (sic).

8) That the OCPD Kiambu Police Station or his agents do assist in compliance with the orders granted herein.

9) That the costs of this application be provided for.

The application is supported by the annexed affidavit of CHARLES NDIRANGU KAMAU one of the Company's Directors and applicants herein, and is based on the following grounds –

a) **That applicants herein are shareholders and/or contributories of the company and vide the Extra-Ordinary General meeting held on 18<sup>th</sup> June, 2010, are the current Directors of the Company.**

b) **That the applicants have been denied/or barred from accessing the premises of the Company and hence cannot undertake day to day duties/operations of the Company.**

c) **That the Company has failed through the Respondents' negligence to call for any general or annual meeting and is not performing its duties as required by law.**

d) **That the Applicants have been denied access to the Company's books of accounts and all other vital records of the Company.**

e) **That the Respondents have treated and continue to treat the affairs of the Company in a personalized manner in blatant disregard of the management structures and shareholders' wishes.**

f) **Some decisions have been made on behalf of the Company which decisions have cost/or will cost the Company serious financial loss/or liabilities.**

**g) That the Respondents having ceased and/or refused to vacate office or hand over and are likely to destroy, remove, alter and/or interfere with the books of accounts or other relevant records of the Company due to the change of Directorship and this suit.**

**h) That the Respondents are likely to destroy, sell, alienate, and/or transfer the assets/properties of the Company by virtue of the change of the Company's management and this suit.**

**i) That the applicants stand to be highly prejudiced if these prayers are not granted.**

**j) It is in the interest of justice and fairness that the prayers are granted.**

Opposing the application, WILLIAM THUKU KIMANI, the 1<sup>st</sup> Defendant/Respondent herein, filed a replying affidavit sworn on 30<sup>th</sup> September, 2010. He deposes in that affidavit, *inter alia*, that the meeting at which the Plaintiffs were purportedly elected as Directors of the Company was not properly convened. The alleged requisition for the meeting was not served on them and some of the requisitionists were not bona fide members of the Company and therefore had no capacity to requisition for any meetings of the Company or to participate in the Company's affairs. He further avers that the applicants have not annexed the agenda which was to be transacted in the purported extra ordinary general meeting. On his own part, and on behalf of the other Defendants, he also attests that they were not served with the notice purportedly convening the meeting; were not made aware of the meeting, and therefore did not attend it. Finally, he avers that the purported registration of the Plaintiffs by the Registrar of Companies was therefore invalid and of no legal effect.

At the oral canvassing of the Application, Mr Magia appeared for the Applicants while Mr Maina held brief for Mr Ngata Kamau for the Respondents. Mr Magia told the court that the Applicants sought

orders that after the extra ordinary general meeting held on 18<sup>th</sup> June, 2010, when new Directors were elected, the former Directors vacated office. Secondly, the Plaintiffs sought an order that those Directors hand over the Company's assets and documents, and that the applicants do enter the premises and repossess those premises as well as the Company's property. Thirdly, the Respondents should be restrained from maliciously interfering with the smooth running of the Company, and lastly, that they should be restrained from removing the properties of the Company.

Relying on the grounds set out on the record, he submitted that the Respondents were misappropriating the Company's assets, and the applicants had been denied access to the Company's books. He also contended that the Respondents were conducting the Company's affairs in a very personalized manner and that they were likely to interfere with the management of the Company's affairs.

In his response Mr Maina for the Respondents relied on the replying affidavit sworn by WILLIAM THUKU KIMANI on 30<sup>th</sup> September, 2010 and especially on the ground that none of the Respondents had been served with the requisition to convene an annual general meeting of the Company. He argued that the names of alleged share-holders on a list which was attached to the 1<sup>st</sup> Applicants supporting affidavit were not countersigned by anyone, and that the Applicants have not attached any agenda or any documents to do with the business of that day. He further submitted that the purported meeting held on 18<sup>th</sup> March, 2010, was in total contravention of Section 185 of the Companies Act, and the allegedly appointed Directors were improperly appointed. He therefore urged the court to dismiss the application.

After considering the application and the arguments of counsel, I am satisfied beyond any doubt that the matters complained of in this application go deeply into the root of the management of NJOKERIO TRADING COMPANY LTD. It is an elementary principle of law that a Limited Liability Company is a separate and distinct legal entity from its members. Both Directors and shareholders have interest in the affairs of the Company but they do not own the Company the way an individual would own a chattel. The management of the Company's affairs is entrusted to the Directors who are to be appointed by a general meeting of the shareholders.

In the course of managing a Company's affairs, the Directors owe their duties not to individual shareholders, but to the Company itself. In the event of any breach of those duties, the Rule in **FOSS v HARBOTTLE** (1843) 2 Hare 461 applies. That Rule ordains that whenever a wrong is done to a

Company, it is the Company and the Company alone which is offended, and therefore it is the Company itself which ought to commence any legal action for any relief. That is the prerogative of the Company exclusively.

In the context of this application, what we have are complaints about Directors refusing to vacate office and managing the Company's affairs in a personalized manner which, in reality, are offensive to the Company. The Rule in **FOSS v HARBOTTLE** covers situations in which what is complained of is some internal irregularity in the conduct of the Company's affairs as in this case, and this includes disputes as to the validity of the appointment of Directors.

In the circumstances of this case, the complaints by the Plaintiffs are therefore nothing more than complaints on behalf of the Company. But because a Company is a legal person in its own right, it is the one and the only one which ought to commence proceedings to rectify the wrongs complained of. The applicants have no locus standi to assume that mantle on behalf the Company. This action, therefore, ought to be brought by the Company itself and not by the Applicants acting individually in their personal capacities. The Company's property belongs to Company and not to them.

For the above reasons, I find that the applicants have no locus standi to institute these proceedings and this suit and attendant application are hereby struck out. For the avoidance of any doubt and in order to prevent grievous wrongs such as those complained of herein going unremedied, I direct that the Company, if it so wishes, brings the action in its name. In the circumstances of this case, I am minded to make no order as to costs as this will probably aggravate the bad blood between the warring factions in the Company to the detriment of the Company itself. In any event, the Defendants themselves did not raise the issue of the proper Plaintiff not being present in Court.

**Dated and delivered at Nairobi** this 17<sup>th</sup> day of December 2010

**L NJAGI**

**JUDGE**



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